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99-1811

~~No. 99-1256~~

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CAFÉ EROTICA, INC.,

Petitioner,

v.

PEACH COUNTY, GEORGIA, THE BOARD OF COMMISSIONERS OF PEACH COUNTY, GEORGIA, CHARLES BARTLETT, Individually and in his capacity as Chairman of the Board of Commissioners of Peach County, Georgia, MATT MULLIS, DR. IRA HICKS, JIMMY WALKER, and ANNA LUMPKIN, Individually and in their capacity as members of the Board of Commissioners of Peach County, Georgia,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Georgia Supreme Court properly upheld the Peach County, Georgia, Ordinance Regulating Adult Entertainment Establishments pursuant to the clearly defined standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).

2. Whether the Georgia Supreme Court properly held that Peach County had a reasonable basis for its belief that the harm to be protected against in fact exists.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action arises under the First and Fourth Amendment to the Constitution of the United States, 42 U.S.C. § 1983, and the Ordinance Regulating Adult Entertainment Establishments of Peach County which is set forth in Appendix D of the Petition.

STATEMENT OF THE CASE

Café Erotica, Inc., petitioner herein, (hereinafter "Petitioner" or "Café Erotica") is a business in Peach County, Georgia that offers totally and partially nude dancing and has sold beer to its patrons. Peach County and the Peach County Board of Commissioners, Respondents herein, (hereinafter "Respondent" or "Peach County"), conducted a public hearing, (R-189-241), and subsequently passed an Ordinance Regulating Adult Entertainment Establishments on June 11, 1996 (hereinafter "the Ordinance"). (R-101-126).

Café Erotica brought an action in the Superior Court of Peach County, Georgia, to enjoin the enforcement of this Ordinance. (R-4-16). Both Peach County and Café Erotica filed motions for Summary Judgment. (R-440-444; R-469-471). The Superior Court of Peach County, Georgia, granted Peach County's Motion for Summary Judgment on January 15, 1999, and denied Café Erotica's Motion. In granting Peach County's Motion, the trial court relied on the Georgia Supreme Court's ruling in *Chambers v. Peach County*, 268 Ga. 672 (1997) (*Chambers II*). (R-2181-2185).

The pertinent events preceding these events are as follows:

On March 4, 1996, in *Chambers v. Peach County*, 266 Ga. 318 (1996) (*Chambers I*), the Georgia Supreme Court struck down Peach County's then-existing adult entertainment ordinance. Specifically, the Court held that "there is no evidence that, before passing the ordinance, the Peach County Commission considered and relied upon evidence of adverse secondary effects." *Id.* at 321. Following the Georgia Supreme Court's guidance in *Chambers I*, on May 7, 1996, the Peach County Board of Commissioners conducted a hearing on adult entertainment. (R-189-241; R-437 ¶ 3). The purpose of that hearing was to "objectively evaluate the impact of adult entertainment establishments on the surrounding neighborhood and on the County in order to determine whether, in the interest of the health, safety, and welfare of the citizens of Peach County, it is necessary or desirable to adopt local legislation concerning the location and/or the regulation of adult entertainment establishments." (R-190-192; R-437,438 ¶3). At the hearing, each Commissioner had a notebook containing information relating to adult entertainment establishments. (R-437 ¶ 3, Ex. B).

The Peach County Commissioners considered studies contained in their notebooks regarding the effects of adult entertainment on other counties and municipalities, including Austin, Texas, and Garden Grove, California. (R-270-273; R-286-348; R-404-422). The Peach County Commissioners also heard testimony from law enforcement authorities concerning increased criminal activity at and surrounding adult entertainment establishments in Peach County. A transcript was made of the hearing, and was made a part

of the record on appeal. (R-437 ¶ 3). Café Erotica did not present the opinions of its expert, Bruce B. McLaughlin, which it offered in support of its arguments on appeal to the Georgia Supreme Court and in this Petition, to the Commissioners for their consideration at the May 7, 1996 hearing before the County Commissioners. No representative of Café Erotica sought to question any of the witnesses who testified at that hearing about the effects of adult entertainment.

On June 11, 1996, Peach County passed a new ordinance regulating adult entertainment, the Ordinance that is being challenged in this case. (R-101-126) Among other things, the Ordinance prohibits the sale or consumption of beer and wine at business establishments where adult entertainment occurs. A copy of the Ordinance is set forth in Appendix D to the Petition for Writ of Certiorari. The Ordinance provides that: "No adult entertainment establishment licensee shall serve, sell, distribute or suffer the consumption or possession of any alcoholic beverages, malt beverages or wine or controlled substance upon the premises of the licensee."

REASONS FOR DENYING THE WRIT

In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955), this Court discussed the dimensions of its discretionary review and why cases, such as this one, are not among those for which such review should be granted:

> [W]e have considered anew whether this case is one in which "there are special and important reasons" for granting the writ of certiorari. . . .
>
> . . .

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . "Special and important reasons" imply a reach to a problem beyond the academic or episodic. This is especially true where issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Id.

Petitioner does not reference Rule 10 of this Court's Rules in its pleading, but it appears Petitioner is seeking review under Rule 10(c). Petitioner appears to be arguing that the Georgia Supreme Court has "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

Response to Petitioner's Question 1 (Argument Headings I, III, and VI).[1]

I. The Georgia Supreme Court properly upheld the Peach County, Georgia, Ordinance Regulating Adult Entertainment Establishments pursuant to the clearly defined standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).

Petitioner's argument under argument heading I that this Court has not yet announced a clearly defined standard for the review of a legislative enactment that seeks to regulate adult entertainment overlooks this Court's decision in *City of Erie v. PAP's A.M., TDBA "KANDYLAND"*, __ U.S. __, 120 S. Ct. 1382, 1391 (2000), which reiterated the standard of review of an ordinance that regulates adult entertainment. In *PAP's*, this Court stated that "[i]f the governmental purpose in enacting a regulation is unrelated to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from *O'Brien* for evaluating restrictions on symbolic speech." *Id.* at 1391. Pursuant to this Court's decision in *United States v. O'Brien*,

> a government regulation is sufficiently justified if it is within the constitutional power of the

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1. Petitioner's "Questions Presented" do not match the headings set forth in the Petition. The first question set forth by Petitioner appears to correspond to argument headings I, III, and VI set forth in the Petition. The second question set forth by Petitioner appears to correspond to argument headings II, IV, and V set forth in the Petition. The third question presented does not appear to correlate to any of the argument headings in the Petition and instead is simply an inflammatory rhetorical question. Respondent has responded to the Questions presented and arguments advanced by Petitioner, as correlated in this footnote.

> Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377 (1968).

In this case, the Georgia Supreme Court analyzed the Ordinance under the test set forth in *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252 (1982). *Café Erotica v. Peach County*, 272 Ga. 47, 48 (2000). The *Paramount* test requires that the ordinance must (1) further an important government interest, (2) be unrelated to the suppression of speech, and (3) restrict speech no more than necessary to further the government interest. *Paramount*, 250 Ga. at 256 (citing *United States v. O'Brien*, 391 U.S. U.S. 367, 377 (1968). The *Paramount* test utilized by the Georgia Supreme Court is the functional equivalent of the test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).

In argument heading number III, Petitioner asserts that the Georgia Supreme Court was unable to formulate a clear standard for the trial court. In upholding the constitutionality of the Ordinance, the Georgia Supreme Court held that "[t]he trial court properly followed our holding in *Chambers II* [*Chambers v. Peach County*, 268 Ga. 672 (1997)] where we found that the ordinance in question was content-neutral and analyzed the constitutionality of the ordinance in question using the three-pronged test outlined in *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252 (1982)." *Café Erotica, Inc. v. Peach County*, 272 Ga. 47, 48 (2000). In *Chambers II*, The

Georgia Supreme Court observed the following regarding Peach County's Ordinance Regulating Adult Entertainment Establishments:

> 2. The new ordinance is designed to combat the undesirable secondary effects of sexually explicit businesses. **In enacting the new ordinance, the county commission considered and relied upon evidence reasonably believed to be relevant to the problem**: they heard testimony interpreting studies of other cities' experience with adult entertainment, which studies showed that areas near adult entertainment establishments suffered a decrease in residential property values and an increase in crime, especially sex-related activity. A GBI drug and vice investigator testified that the number of illegal drug and vice complaints at the two Peach County clubs offering adult entertainment far exceeded the number of complaints received from any other business in 33 middle-Georgia counties, and the Peach County sheriff testified to increased criminal activity at the two clubs and at businesses located near them. *Compare Chambers v. Peach County*, supra, 266 Ga. 318 (1-3).
>
> Since **the new ordinance is designed to combat the undesirable secondary effects of sexually explicit businesses, it is content-neutral** and is put to the three-pronged test enunciated in *Paramount Pictures v. Busbee*, 250 Ga. 252 (1) (297 S.E.2d 250) (1982), for content-neutral legislation. *Chambers v. Peach County*, supra, 266 Ga. at 319. **The ordinance in question**

> **meets the Paramount criteria** in that it furthers important governmental interests (the reduction of crime and the protection of property values) which interests are unrelated to the suppression of speech, and the incidental restriction of speech is no greater than necessary to further the governmental interests. *Quetgles v. City of Columbus*, 268 Ga. 619(2) (491 S.E.2d 778) (1997).

Chambers II, 268 Ga. at 673-74 (emphasis added). The Georgia Supreme Court concluded that "Café Erotica presents no new evidence or arguments that would give us cause to depart from our holding in *Chambers II*." *Café Erotica*, 272 Ga. at 48. Contrary to Petitioner's arguments, the Georgia Supreme Court has formulated a clear standard for the trial court, that standard was applied in this case, and it is consistent with the standard set forth by this Court in *O'Brien*.

It is incorrect to contend that the Georgia Supreme Court in this case has decided an important question of federal law that has not been, but should be, decided by this Court. This Court, in *PAP's*, and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and *O'Brien*, has set forth the standard to be used when the governmental purpose in enacting an ordinance is unrelated to the suppression of expression, and the Georgia Supreme Court's decision in *Café Erotica, Inc. v. Peach County*, 272 Ga. 47, 48 (2000) is consistent with those decisions.

Under argument heading VI, Petitioner contends that the Eleventh Circuit has struggled over what standards are applicable to scrutiny of ordinances designed to combat the

negative secondary effects of adult entertainment. This argument is not relevant to the matters within the scope of Supreme Court Rule 10(c). Nor does this argument address the question whether "a state court of last resort has decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals." Sup. Ct. R. 10(b). The Eleventh Circuit clearly held in *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998), *cert. denied*, __ U.S. __, 120 S. Ct. 1553 (2000), that the *O'Brien* test is the applicable standard for reviewing ordinances such as Peach County's Ordinance. The Georgia Supreme Court's decision in *Café Erotica, Inc. v. Peach County*, 272 Ga. 47, 48 (2000) does not decide an important federal question in a way that conflicts with the Eleventh Circuit Court of Appeals' decision in *Sammy's*, and Petitioner does not argue that any such conflict exists. Sup. Ct. R. 10(b).

Response to Questions Presented 2
(Argument Headings II, IV, and V).

II. The Georgia Supreme Court properly held that Peach County had a reasonable basis for its belief that the harm to be protected against in fact exists.

Rule 10 provides that "a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Despite the instruction of Rule 10, Petitioner urges this Court to grant certiorari "to allow the strong factual challenge to the Myth of Secondary Effects to be heard." (Petition, p. 15). When reduced to its essence, Petitioner's argument is a factual argument. Petitioner argues that unlike this Court's recent decision in *PAP's*, in this case

there is "no evidence of negative secondary effects in Peach County or in any other locale or jurisdiction." (Petition, p. 17).

Not only does Petitioner assert that this Court should grant a writ because of an asserted erroneous factual finding by the court below, Petitioner also seeks to undermine the holdings of numerous cases by way of an affidavit from its "expert." Petitioner asserts that the precedential value of this Court's prior decisions in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976) and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) is lacking, because its expert has reviewed the record before the Court in *Young*, and "found it 'difficult to imagine how the entire concept of "adverse secondary effects" of adult uses became accepted as "fact." ' " (Petition, p. 16).

Petitioner's attempt to use an after-the-fact expert to opine the "true facts" behind this Court's previous decisions is simply an effort to avoid precedent. But as the United States Court of Appeals for the Eleventh Circuit stated, "[f]or determining whether a previous case provides controlling precedent in a case before the court, the legal strategies and underlying circumstances of the earlier case are less important than the language and holding of the previous decision, and its applicability to the facts of the case before the court." *David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1332 (11th Cir. 2000). Petitioner's effort is also contrary to the principal purposes of stare decisis, which are to protect reliance interests and to foster stability in the law. *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 70 (1993) (Scalia, J., concurring).

Petitioner contends that because there were no problems associated with Café Erotica or Neon Cowboy, there is no evidence of any "problem" in Peach County to be addressed by the Ordinance. Petitioner also argues that because its expert has opined that no studies support the conclusion that adult entertainment causes negative secondary effects, there is no basis upon which a reasonable person could conclude that negative secondary effects exist. Whether the adverse secondary effects of adult entertainment, or adult entertainment in combination with alcohol, have yet been visited upon Peach County, or whether a reasonable person involved in land use planning could conclude that adult entertainment causes negative secondary effects, however, are not controlling to the question whether Peach County constitutionally enacted its Ordinance. The relevant question is whether the local governing body had a reasonable basis for its belief that the harm to be protected against in facts exists. State and federal precedents support the conclusion that Peach County did have such a basis when it enacted the Ordinance.

It is settled under Geogia law that local governments are entitled to rely on studies conducted by other counties and municipalities in enacting ordinances regulating adult entertainment. In *Quetgles v. City of Columbus*, 268 Ga. 619 (1997) (*Quetgles II*), the appellant contended that the city had not presented evidence of the negative secondary effects associated with private lingerie modeling businesses to justify its asserted interest in crime prevention and protecting property values. The Georgia Supreme Court rejected the appellant's argument, stating that "we have stated that the City need only prove it considered specific evidence of the negative secondary effects of adult entertainment businesses which it reasonably believed to be relevant to the interest

motivating the ordinance." *Quetgles II*, 268 Ga. at 620. The Georgia Supreme Court held that the studies and evidence relied upon in *Quetgles II*, the same studies declared insufficient by Café Erotica's retained expert in the present case, were "sufficient to support the City Council's interest in protecting property values and preventing criminal activity in areas near the one-on-one lingerie modeling shops." *Id. See also Parker v. Whitfield County*, 265 Ga. 829 (1995); *World Famous Dudley's Food & Spirits, Inc. v. City of College Park*, 265 Ga. 618 (1995); *Club Southern Burlesque v. City of Carrollton*, 265 Ga. 528, 530 (1995); *Gravely v. Bacon*, 263 Ga. 203 (1993).

Previous decisions of this Court and the Eleventh Circuit also make clear that a local government need not await the localized effects of adult entertainment before it acts. In *City of Renton v. Playtime Theatres, Inc.*, 501 U.S. 560 (1986), this Court made clear that a local government need not have firsthand experience of the adverse secondary effects of activities containing an expressive component protected by the First Amendment in order to justify regulation of these activities. In *Renton*, this Court considered a First Amendment challenge to an ordinance regulating the location of adult movie theaters. To justify its ordinance, in order to show that it was "designed to serve a substantial government interest," *Renton*, 475 U.S. at 50, the city was not required to consider evidence "specifically relating to 'the particular problems or needs of Renton' ", *id.*, but was "entitled to rely on the experiences of . . . other cities" as well as findings summarized in a prior Washington state opinion. *Renton*, 475 U.S. at 51. This Court held that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever

evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52.

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (1991), in a plurality decision, this Court rejected a First Amendment challenge to the enforcement against nude dancing establishments of Indiana's law prohibiting public nudity. As Justice Souter stated in his concurring opinion, the Supreme Court in *Renton* recognized "that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects. . . ." *Barnes*, 501 U.S. at 584.

More recently, in *PAP's*, this Court held that "[b]ecause the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *California v. LaRue*, 409 U.S. 109 (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood." *PAP's*, __U.S. at __, 120 S. Ct. at 1395.

In *International Eateries of America, Inc. v. Broward County, Florida*, 941 F.2d 1157, 1162-63 (11th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992), the Eleventh Circuit rejected the argument of the adult entertainment business that evidence in the record showed that it had not, in fact, caused any adverse effects on surrounding property values and that property values had actually increased at a higher

rate than before the opening of the establishment as holding "no weight." 941 F.2d at 1163. Said the court, "[i]f the decision [to regulate the adult business] was valid ex ante, International Eateries cannot justify violating the ordinances by showing they were unwise ex post." *Id.*

The Eleventh Circuit recently made clear that evidence relating to "the particular problems or needs of . . . [Peach County]", *Renton*, 475 U.S. at 50, is not necessary under the First Amendment to show that the Ordinance serves a substantial government interest. In *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.2d 993, 997 (11th Cir. 1998), the Eleventh Circuit determined that "the experience of other cities, studies done in other cities, case law reciting findings on the issue, as well as their own wisdom and common sense" are sufficient to establish that a local government has a "reasonable basis" for enacting regulations to serve a substantial governmental interest. Controlling decisions of the United States Supreme Court and this Court, and persuasive opinions of the Eleventh Circuit demonstrate the fatal flaws in Petitioner's arguments.

Like the Mobile ordinance in *Sammy's*, the Peach County Adult Entertainment Ordinance "does not seek to ban bars or nude dancing." *Sammy's*, 140 F.3d at 999. Rather, "[e]veryone can still buy a drink and watch nude dancing in . . . [Peach County]. They cannot, however do both in the same place." *Id.*

CONCLUSION

Petitioner asks this Court to overturn numerous prior decisions in order to impose an "unnecessarily rigid burden of proof" on local governments attempting not to ban commercial nude dancing or to interfere with its erotic message, but to regulate its adverse secondary effects. In this case, the Peach County Commissioners considered and relied not only upon studies and experience of other communities, but also upon the testimony of local law enforcement officers. This is sufficient.

The Petition for Writ of Certiorari should be denied because compelling reasons for granting the writ are wholly lacking from this case. Sup. Ct. R. 10. The Georgia Supreme Court evaluated the Ordinance under appropriate constitutional standards, based on the facts as presented in the record, and no basis in law or fact exists for this Court to revisit the ruling of the Georgia Supreme Court.

Accordingly, Respondents pray that the certiorari petition be denied.

Respectfully submitted,

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